Filed 1/3/19 P. v. W.L. CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. W.L., Defendant and Appellant.	A149231 (Del Norte County Super. Ct. No. CR F 15-9237) **ORDER GRANTING MOTION FOR RE-CAPTIONING; AND MODIFYING OPINION [NO CHANGE IN JUDGMENT]**

THE COURT:

Appellant's motion for re-captioning of appeal, filed December 14, 2018, is granted.

It is ordered that the opinion filed on December 11, 2018, is modified as follows:

On page 1, in the caption, Defendant and Appellant's name shall read: "W.L."

On page 1, the first sentence of the first paragraph shall read: "Defendant W.L. appeals a judgment entered upon a jury verdict finding him guilty of rape in concert (Pen. Code, § 264.1),[1] with the circumstance that the victim was kidnapped in the commission of the offense (§ 667.61, subd. (d)(5))."

On page 18, the case name under the footnote, shall read: "*People v. W.L.* (A149231)"

The modification effects no change in the judgment.

Date:_____ _____ Acting P.J.

Filed 12/11/18 P. v. Lor CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. WILSON LOR, Defendant and Appellant.	A149231 (Del Norte County Super. Ct. No. CR F 15-9237)

Defendant Wilson Lor appeals a judgment entered upon a jury verdict finding him guilty of rape in concert (Pen. Code, § 264.1),[1] with the circumstance that the victim was kidnapped in the commission of the offense (§ 667.61, subd. (d)(5)). He contends he is entitled to a transfer hearing on his suitability for disposition under the juvenile law, that he was deprived of effective assistance of counsel, and that the trial court failed to instruct the jury correctly on the section 667.61 circumstance.

We shall reject defendant's challenges to his counsel's representation and the instructions, but conditionally reverse the judgment and remand the matter to the juvenile court for a transfer hearing on whether the matter should have proceeded in juvenile court. If the juvenile court determines defendant is amenable to the court's jurisdiction, his conviction shall be deemed a juvenile adjudication and the juvenile court shall impose

[1] All undesignated statutory references are to the Penal Code.

an appropriate disposition. If the juvenile court concludes the matter should be transferred to a court of criminal jurisdiction, defendant's conviction shall be reinstated.

I. BACKGROUND

A. The Crime

The victim of the crime, M.B., was walking home at approximately 1:30 a.m. on January 11, 2015, after attending a party. She had had several drinks at the party but was not feeling their effect much when she left. As she walked, she heard two male voices behind her say, "Hey, girl. How you doing tonight?" She said, "Hi. Have a good night," and continued walking. She turned and saw two men, whom she referred to in her testimony as "Suspect No. 1" and "Suspect No. 2." Suspect 1 grabbed her wrist and arm and Suspect 2 touched her shoulder and grabbed her arm, so she was unable to continue walking. They told her they wanted her to "party" with them, and she said she was going home and did not want to party. She tried to pull her arms away and told them to let her go, and they said, "Come on. You're going to go party with us."

The two men pulled and shoved M.B. across the road, telling her they wanted her to drink and that she was going to have a good time. She continued to say she did not want to join them and wanted to go home. They were speaking another language to each other. Still keeping a hold on her, they took her into a house, through a mud room and kitchen, and into the living room. As she entered the house, she asked to leave and said she did not want to be there.

In the living room, M.B. saw defendant sitting on a couch. Suspect 1, Suspect 2, and defendant spoke to each other in a language M.B. did not know. There were alcohol bottles on the floor, and all three men smelled of alcohol. Defendant stood up, walked toward her, and introduced himself to her. Suspect 1 sat on a loveseat and pulled her down to sit with him. The conversation of the three men alternated between English and the foreign language. The men drank from a large bottle of alcohol and offered her a drink, which she refused. They tried to force her to drink numerous times by putting a glass up to her lips, so the drink rolled down the side of her face. When some of it got into her mouth, she spat it out.

The group remained in the living room for about two hours, during which M.B. kept asking them to let her go. She asked several times to use the restroom, but they refused. Finally Suspect 1 grabbed her arm and took her to the restroom. She went inside and locked the door behind her. She hoped to be able to climb out through a window, but the window was too small. She heard the three men banging on the bathroom door, telling her to hurry up, and saying they wanted her to go back and party with them. Eventually she unlocked the door and went out. She felt she had no other choice.

When M.B. opened the restroom door, Suspect 1 grabbed her wrist and tried to lead her down the hall, and she tried to punch his face. The other two men were further down the hall; she could not see them but could hear their voices. Suspect 1 pulled her into a bedroom, and the other two men entered the room. Suspect 1 pushed her onto the bed, while Suspect 2 and defendant stood talking to each other. She kept saying "no," asking them to stop, and asking for help, but no one helped her. Suspect 1 crawled on top her, held her hands above her head, partially undressed himself and her, and raped her for an hour or an hour and a half. She told him several times to stop and tried to shove him off her with her knees. Before Suspect 1 raped her, and at least two more times while he was doing so, M.B. heard the sound of a condom wrapper being ripped open.

When Suspect 1 got off M.B., she tried to get off the bed, but Suspect 2 pushed her down, held her down with his forearms, and raped her. M.B. told him "no" repeatedly and asked for help. Suspect 2 continued to rape her for 45 minutes to an hour. She did not recall whether she heard condom wrappers. Defendant continued to stand by the bed. When Suspect 2 got off of M.B., she tried to "knee" him in the groin. He turned to defendant and said in English that it was his turn.

M.B. again tried to get off the bed, but defendant pushed her down, lay on top of her, and raped her. She repeatedly told him no, tried to push him off, scratched his back and sides, told him to get off her, and bit his neck. He continued to rape her for an hour to an hour and a half. She did not recall whether he wore a condom. When he was finished, he rolled off her and let her get off the bed.

The three men looked frightened and asked M.B. not to call the police. Defendant asked her two or three times not to call the police. She agreed not to do so, and they allowed her to leave the house. It was about 7:00 in the morning.

Later that morning, M.B. went to a hospital. She underwent a sexual assault examination the next day. Marks on her body were consistent with her account of the sexual assault.

Police officers went with a search warrant to the house M.B. had described. Defendant answered the door and told the officers he lived there. He had a bandage on his neck. An officer removed the bandage and saw what appeared to be a bite mark. Defendant was asked to remove his shirt and he did so, revealing scratch marks on his back. The officers took a buccal swab from defendant.

Nine used condoms were found in the kitchen garbage. They were tested for DNA. DNA consistent with M.B. was found on all nine. DNA consistent with defendant was found on three. The DNA of two unknown males was also found among the condoms. DNA was mixed on some of the condoms. DNA could be mixed either through sexual encounters with the same person or through condoms being put together.

When he was arrested, defendant initially said, "I didn't do it." When he was confronted with the DNA results, he admitted to having had sex with M.B., but he said it was consensual. At trial, he did not take the stand or present any other witnesses for the defense.

B. Procedural History

Defendant was charged with kidnapping for rape (§ 209, subd. (b); count 1), forcible rape in concert (§ 264.1; count 2), and forcible rape (§ 261, subd. (a)(2); count 3). The operative information included a special allegation that in the commission of the offense of forcible rape in concert, "any person kidnapped the victim . . . and the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense." (§ 667.61, subds. (c)(3) & (d)(5).)

Defendant was first tried in April 2016. This trial resulted in a hung jury, and the court declared a mistrial. The second trial took place in June 2016. Only count 2, rape in concert (§ 264.1), was submitted to the jury, along with the kidnapping special allegation (§ 667.61). The jury found defendant guilty of rape in concert and found true the additional allegation that "any person kidnapped [M.B.] increasing the risk of harm to her." The trial court sentenced defendant to a prison term of 25 years to life. (§ 667.61, subd. (a).)[2]

II. DISCUSSION

A. Right to Juvenile Court Transfer Hearing

Defendant was 16 years old when he committed the crime. At the time he was charged and tried, California law in specified circumstances permitted, and sometimes required, a district attorney to file a case against a juvenile directly in adult court. (Former Welf. & Inst. Code, §§ 602, subd. (b) & 707, subd. (d), repealed by Prop. 57, §§ 4.1 & 4.2, as approved by voters Gen. Elect. (Nov. 8, 2016, eff. Nov. 9, 2016); *People v. Vela* (2018) 21 Cal.App.5th 1099, 1105 (*Vela*).) Proposition 57 amended the law " 'to eliminate direct filing by prosecutors. Certain categories of minors . . . can still be tried in criminal court, but only after a juvenile court judge conducts a transfer hearing to consider various factors such as the minor's maturity, degree of criminal sophistication, prior delinquent history, and whether the minor can be rehabilitated.' " (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 305–306 (*Lara*); Welf. & Inst. Code, § 707.) Our high court has held that these amendments apply retroactively to all juveniles charged directly in adult courts whose judgments were not yet final when Proposition 57 was enacted. (*Lara*, at pp. 303–304, citing *In re Estrada* (1965) 63 Cal.2d 740.) Defendant falls into this category, and he is entitled to the benefit of a transfer hearing pursuant to Proposition 57.

[2] Defendant asks us to take judicial notice of trial court records in the case against one of the alleged co-perpetrators. These records are not relevant to the issues before us, and we deny the request. (See *People v. Rowland* (1992) 4 Cal.4th 238, 268, fn. 6.)

The court in *Vela* explained the proper remedy in such a circumstances: "When conducting the transfer hearing, the juvenile court shall, to the extent possible, treat the matter as through the prosecutor had originally filed a juvenile petition in juvenile court and had then moved to transfer [defendant's] cause to a court of criminal jurisdiction. ([Welf. & Inst. Code,] § 707, subd. (a)(1).) If, after conducting the juvenile transfer hearing, the court determines that it would have transferred [defendant] to a court of criminal jurisdiction because he is 'not a fit and proper subject to be dealt with under the juvenile court law,' then [defendant's] convictions are to be reinstated. ([Welf. & Inst. Code,] § 707.1, subd. (a).)" (*Vela, supra,* 21 Cal.App.5th at p. 1113.) The same remedy is appropriate here, and we shall order the same disposition.

B. Ineffective Assistance of Counsel

Defendant contends his counsel rendered ineffective assistance by failing to cross-examine M.B. about discrepancies between her testimony in the first and second trials.

"Establishing a claim of ineffective assistance of counsel requires the defendant to demonstrate (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result." (*People v. Dennis* (1998) 17 Cal.4th 468, 540–541.) "A court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance." (*Id*. at p. 541.) Matters involving trial tactics are generally " 'not subject to judicial hindsight and the courts will not attempt to second-guess trial counsel. . . . "It is not sufficient to allege merely that the attorney's tactics were poor, or that the case might have been handled more effectively." ' " (*People v. Blomdahl* (1993) 16 Cal.App.4th 1242, 1248.) When a defendant makes an ineffective assistance claim on direct appeal, "the appellate court must look to see if the record contains any explanation for the challenged aspects of representation. If the record sheds no light on why counsel acted or failed to act in the manner challenged, 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory

explanation' [citation], the contention must be rejected." (*People v. Haskett* (1990) 52 Cal.3d 210, 248 (*Haskett*).) Thus, "[r]eviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions." (*People v. Lucas* (1995) 12 Cal.4th 415, 442.)

Moreover, "[i]f a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient." (*People v. Mayfield* (1997) 14 Cal.4th 668, 784 (*Mayfield*).) Prejudice is established when counsel's performance " 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " (*Ibid*., quoting *Strickland v. Washington* (1984) 466 U.S. 668, 686.) Prejudice must be proved as a " 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel." (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

Defendant challenges his counsel's failure to use the transcript of the first trial in several respects.[3] At the first trial, M.B. testified that when she came into the house and saw defendant, she heard him say something like, "What are you guys doing?" When asked if he had an "excited or surprised sort of tone to his voice," she testified that he did. She did not offer similar testimony at the second trial, instead testifying that she did not remember what defendant said to the other two men. Defendant contends his counsel was ineffective because, if the jury had heard and credited M.B.'s testimony, it would likely have had a doubt about whether he knew she had been kidnapped, and hence a doubt about whether to find the kidnapping allegation true.

We reject this contention. The theory of the defense was not that defendant was ignorant of the kidnapping, but that M.B. was not telling the truth. During closing

[3] In his opening brief, defendant argued that his counsel was ineffective in failing to obtain the transcript of the first trial. In his reply brief, he acknowledges that it appears his counsel did, in fact, have a copy of the transcript. Accordingly, we will not address this contention.

argument, defense counsel argued that M.B. might have consented to sex with defendant, realized he was under the age of consent, and concocted a false rape accusation to protect herself from the legal consequences of unlawful sex with a minor. While this theory was unsuccessful, we cannot say there was no possible tactical purpose for failing to present evidence that would, in any event, not have advanced his defense. As we shall explain below, the kidnapping allegation did not depend on defendant's knowledge that M.B. had been kidnapped.

Defendant also contends trial counsel was ineffective in failing to elicit testimony from the first trial and the preliminary hearing about whether he used a condom while having intercourse with M.B. At the second trial, M.B. testified she did not recall whether he used one. At the first trial, she had testified that she did not hear condom wrappers being opened as defendant approached the bed and that she did not recall whether he used a condom. At the preliminary examination, an investigator with the District Attorney's office had testified that M.B. told her shortly after the crime that she did not think the third person to rape her wore a condom, because one of the men felt different than the others. This earlier testimony, according to defendant, indicates that he did not use any of the condoms in the garbage. He suggests that the jury might have concluded he was the first to have intercourse with M.B., he had her consent, he did not use a condom, and his DNA was transferred on the condoms when the other men later had intercourse with her. This theory is highly speculative and unsupported by the testimony at trial, and we cannot conclude either that defense counsel had no possible tactical purpose for failing to present it to the jury or that it is reasonably probable defendant would have obtained a better result if counsel had done so.

Defendant also points to a number of minor differences between M.B.'s testimony in the two trials, some of them so trivial as to be frivolous: for instance, a difference of one in the number of drinks M.B. said she had at the party she attended earlier in the evening; whether she first heard Suspect 1 and Suspect 2's voices from her left side or behind her; whether she stopped walking briefly when she heard the voices; whether the men were drinking from a gallon-sized or half-gallon-size bottle of alcohol; whether they

stayed in the living room for "[a]bout two hours" or "[m]aybe two, three hours"; at what point one of men commented "It's how us Wisconsin boys get down"; whether defendant or Suspect 1 left the room while Suspect 2 was raping her; whether the man she kicked in the groin was Suspect 1 or Suspect 2; whether she recalled the men ejaculating; and which of the men asked her not to call the police.

Defendant argues that if his counsel had confronted M.B. with these minor differences in her testimony, the jury might have been more skeptical of her credibility, and that counsel was ineffective for failing to do so. This is not a case in which there " 'simply could be no satisfactory explanation' " for counsel's actions. (*Haskett*, *supra*, 52 Cal.3d at p. 248.) The discrepancies were minor, and counsel might well have concluded he would lose more by appearing to badger a witness recounting a prolonged sexual assault than he would gain by challenging her with them on cross-examination.

On this record, defendant's claim of ineffective assistance of counsel fails.

C. Jury Instructions on Kidnapping Allegation

Defendant was sentenced under section 667.61, often called the "One Strike" law, which provides for a sentence of 25 years to life for a defendant who, inter alia, commits rape in concert in violation of section 264.1 in specified circumstances. (§ 667.61, subds. (a), (c)(3); see *People v. Luna* (2012) 209 Cal.App.4th 460, 465.) One of those circumstances is that "[t]he defendant committed the present offense in violation of Section 264.1 . . . and, in the commission of that offense, *any person* committed any act described in paragraph (2), (3), or (4) of this subdivision." (§ 667.61, subd. (d)(5), italics added.) The specified acts include a kidnapping of "the victim of the present offense" where "the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense . . ." (667.61, subd. (d)(2).)

Immediately after instructing the jury on the elements of the crime of rape in concert, the trial court continued: "If you find the defendant guilty of rape in concert, you must then decide whether the [P]eople have proved the additional allegation under Penal Code Section [667.61] that any person kidnapped [M.B.], increasing the risk of

harm to her. [¶] To prove this allegation, the [P]eople must prove that: One, any person took, held, or detained [M.B.] by the use of force or by instilling reasonable fear; two, using that force or fear, any person moved [M.B.] or made her move a substantial distance; three, the movement of [M.B.] substantially increased the risk of harm to her beyond that necessarily present in the rape in concert; and, four, [M.B.] did not consent to the movement." Defendant contends this instruction was inadequate in several respects.

1. Defendant's Knowledge of the Kidnapping or Belief in Victim's Consent

Defendant contends the instruction on the kidnapping circumstance was deficient because it omitted an element of the allegation, that is, his knowledge that M.B. had been kidnapped. As a result, he argues, he was deprived of his right under *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), to have the jury decide all facts that increase the maximum penalty for his crime.[4] He argues this omission was material because there was evidence that he did not know M.B. had been kidnapped: the kidnapping was consistent with a crime of opportunity that took place while defendant was inside the house, he stood up and introduced himself to her when she entered the living room, and she made no physical effort to leave the house while the group was in the living room for two hours. In a closely related argument, he contends the trial court erred in failing to instruct the jury that one of the elements of the section 667.61 circumstance was a lack of belief in M.B.'s consent to the movement.

The assumption behind defendant's argument is that the kidnapping circumstance applies only if defendant knew that the other two men had kidnapped M.B. To support the argument, defendant points to offenses that include knowledge as an element: Accessories to a felony include only those who aid the principal of a felony with knowledge that the principal has committed the felony (§ 32); liability as an aider and abettor requires proof that the person acted with knowledge of the perpetrator's criminal purpose (*People v. Beeman* (1984) 35 Cal.3d 547, 560); a corporate officer is not criminally liable for an act of a corporation unless she or she participated in or personally

[4] The normal penalty for rape in concert is imprisonment for five, seven, or nine years. (§ 264.1, subd. (a).)

knew of the criminal behavior. (*Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 456–458.)

These authorities do not show that knowledge of the kidnapping is an element of the section 667.61 circumstance. Section 667.61 does not establish a substantive offense; rather it is "an alternate penalty scheme that, when charged, defines the length of imprisonment for the substantive offense . . ." (*People v. Perez* (2010) 182 Cal.App.4th 231, 239.) And the crucial distinction between this case and those upon which defendant relies is that the act for which defendant was sentenced—rape in concert—was criminal whether or not the victim was first kidnapped.

It is well established that, "generally a 'mistake of fact relating only to the gravity of an offense will not shield a deliberate offender from the full consequences of the wrong actually committed.' " (*People v. Ervin* (1997) 53 Cal.App.4th 1323, 1330 (*Ervin*).) Thus, our high court has explained, "in some circumstances, severely enhanced penalties may be imposed absent the accused's knowledge of all the facts bringing his conduct within the prohibition of the statute. For example, courts have upheld penalties for the distribution of illegal drugs within 1,000 feet of a school even in the absence of proof that the accused knew he was within 1,000 feet of a school, and for the possession with the intent to distribute illicit drugs exceeding certain weight limits even in the absence of proof that the accused knew the drugs exceeded the specified weight limits. [Citations.] [¶] This is permissible because *the enhancements do not criminalize otherwise innocent activity*, since the statues incorporate the underlying crimes, which already contain a mens rea requirement." (*People v. Coria* (1999) 21 Cal.4th 868, 879–880, italics added.)

Ervin is instructive. The defendant there was convicted of robbery; because the robbery occurred in the vicinity of an automated teller machine (ATM) the victim had just used, the robbery was of the first degree. (*Ervin*, *supra*, 53 Cal.App.4th p. 1326; § 212.5, subd. (b).) He argued his conviction should be reversed because the prosecution did not prove he knew the victim had used an ATM before the robbery. The appellate court found this contention meritless, reasoning: "Penal Code section 211 defines the

crime: the taking of another's personal property accomplished by means of force or fear. Section 212.5 prescribes a greater punishment for robbing someone who is using an ATM, or someone who has just used an ATM and is still in the vicinity of the machine. The greater punishment is to deter ATM robberies. Thus, if one person intends to rob another, the fact that the victim has just used an ATM relates merely to the gravity of the offense; the statute does not expressly require defendant's knowledge that the victim has used an ATM, and the robber's ignorance of the victim's ATM use does not negate criminal intent." (*Ervin*, at p. 1331.)

Ervin noted that this rule has been applied in a variety of contexts: "[I]n burglary prosecutions, a defendant's own beliefs concerning the residential nature of a building have nothing to do with the question of the degree of the burglary. (*People v. Hines* (1989) 210 Cal.App.3d 945, 949 [disapproved on another ground in *People v. Allen* (1999) 21 Cal.4th 846, 864, 866, fn. 21]; *People v. Parker* (1985) 175 Cal.App.3d 818, 823; see also *People v. Magpuso* (1994) 23 Cal.App.4th 112, 115–118 [mistake of age no defense to aggravated punishment for kidnapping child under 14]; *People v. Williams* (1991) 233 Cal.App.3d 407, 410–412 [mistake of age no defense to selling controlled substance to minor].)" (*Ervin, supra*, 53 Cal.App.4th at p. 1330; see also *People v. Olsen* (1984) 36 Cal.3d 638, 649 (*Olsen*) ["one who commits lewd or lascivious acts with a child, even with a good faith belief that the child is 14 years of age or older, does so at his or her peril."].)

All of the cases share a characteristic with the one before us now: The defendant's conduct was criminal even in the absence of the factor that led to harsher punishment. Robbing someone, selling illegal substances, and committing lewd and lascivious acts with a child are culpable in even the absence of the additional factor—the victim's age, or proximity to a school or ATM. Similarly, rape in concert is a crime, whether or not the victim is first kidnapped. Defendant acted at his peril in joining with two perpetrators who brought a woman into his home and raped her, even if he did not know or believe she had been kidnapped.

The fact that the other two suspects, rather than defendant, kidnapped M.B. does not change our conclusion. (See *People v. Overten* (1994) 28 Cal.App.4th 1497, 1500 [no scienter requirement for aider or abettor to be found vicariously armed with a firearm under § 12022, subd. (a)(1)]; *People v. McGreen* (1980) 107 Cal.App.3d 504, 524–525, overruled on other grounds, *People v. Wolcott* (1983) 34 Cal.3d 92, 101 [same].)

Thus, defendant's argument that the trial court failed to instruct the jury properly as to the elements of the kidnapping allegation fails. *Apprendi* did not require the trial court to submit to the jury the question of whether he knew M.B. had been kidnapped because that is not an element of the section 667.61 allegation. And the authorities we have discussed likewise establish that defendant's lack of belief in M.B.'s consent to the movement is not an element of the allegation.

In a variation on these arguments, defendant contends the trial court erred in failing to instruct the jury that his reasonable, good-faith belief in the victim's consent was a *defense* to the kidnapping allegation. "It is true that at common law, ' " ' an honest and reasonable belief in the existence of circumstances, *which, if true, would make the act for which the person is indicted an innocent act*, has always been held to be a good defense.' " ' " (*Olsen, supra*, 36 Cal.3d at p. 649, italics added; see *People v. Howard* (1996) 47 Cal.App.4th 1526, 1533, disapproved on another ground in *People v. Fuhrman* (1997) 16 Cal.4th 930, 947, fn. 11 [mistake of fact is a defense to rape charge where defendant had good faith, reasonable belief victim consented to sexual intercourse]; *People v. Mayberry* (1975) 15 Cal.3d 143,155 [a defendant who has reasonable and bona fide belief that a prosecutrix consented to accompany him and engage in sexual intercourse does not possess wrongful intent necessary for kidnapping or rape].) Because defendant's act in raping M.B. would be culpable regardless of whether she was first kidnapped, this rule has no application here.

We recognize there is evidence that could support a conclusion that defendant did not know M.B. had been kidnapped: he stood up and introduced himself when she entered the house, and she did not make any physical effort to leave the living room. Nothing we say is intended to prevent the juvenile court from taking this evidence into

consideration in deciding whether to retain jurisdiction over defendant, but the evidence cannot support additional jury instructions of the sort defendant urges here.

2. Kidnapping "In the Commission of" the Offense

Section 667.61, subdivision (d)(5) applies to those who commit rape in concert and, "in the commission of that offense," any person kidnaps the victim. Defendant contends the trial court erred in failing to instruct the jury that the kidnapping must take place "in the commission of" the offense for that circumstance to exist. He argues further that the jury should have been instructed that "in the commission of" the rape meant the kidnapping was occurring while he was engaged in the rape, during the time M.B. was being raped, or in the course of or "in the perpetration" of the rape.

The trial court is required to instruct the jury on every material issue presented by the evidence, including every element of an offense. (*People v. Flood* (1998) 18 Cal.4th 470, 480–481.) "When we review challenges to a jury instruction as being incorrect or incomplete, we evaluate the instructions given as a whole, not in isolation. [Citation.] 'For ambiguous instructions, the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction.' " (*People v. Rundle* (2008) 43 Cal.4th 76, 149.) The court need not give "pinpoint" instructions relating particular facts to an element of the charged crime, and "if the instruction as given is adequate, the trial court is under no obligation to amplify or explain in the absence of a request that it do so." (*People v. Mayfield, supra,* 14 Cal.4th at p. 778.)

Although the instruction did not contain the words "in the commission of" the offense, it adequately informed the jury of the meaning of that term as construed by our high court. The defendant in *People v. Jones* (2001) 25 Cal.4th 98, 100–101, 107 (*Jones*) was sentenced under section 12022.3, subdivision (a), which provides enhanced penalties if a person uses a firearm or deadly weapon "in the commission of" specified sexual crimes, and another provision of the One Strike law, former subdivision (e)(4) of section 667.61 (now subdivision (e)(3)), which includes as a circumstance the personal use of " 'a dangerous or deadly weapon or firearm *in the commission of the present offense* in violation of Section . . . 12022.3.' " The question before the court was the meaning of the

phrase "in the commission of" as used in both statutes, specifically whether the use of a weapon *after* a series of sex crimes may be found to have occurred "in the commission of" the crimes. (*Jones*, at pp. 107–108.) The court looked to other statues containing the same or similar language, including cases considering whether a crime took place during the commission of rape or of a felony enumerated in section 189. (*Id*. at pp. 108–109.) The dispositive question, the court explained, is not the timing of the events, but "whether the relationship between the rape and another crime was sufficiently close to justify an enhanced punishment." (*Id*. at p. 109; see *People v. Fausto* (2009) 180 Cal.App.4th 890, 901 (*Fausto*) [discussing "expansive" reading of phrase "in the commission of"].)

The court in *Jones* relied on *People v. Masbruch* (1996) 13 Cal.4th 1001. (*Jones*, *supra*, 25 Cal.4th at pp. 109–110.) The defendant there pointed a gun at the victim, tied her and her mother up, searched the house for jewelry and money, then raped and sodomized the victim. (*Masbruch*, *supra*, 13 Cal.4th at p. 1004.) The question before the court was whether the defendant used a gun "in the commission of" sex offenses for purposes of section 12022.3, subdivision (a) because he displayed it only at the outset of his criminal activity, approximately an hour before the sexual offenses, and he left the victim several times in the interim to commit crimes in other parts of the house. (*Id*. at p. 1006.) The court concluded that the enhancement "attaches to an offense . . . if the firearm use aids the defendant in completing one of its essential elements." (*Id*. at p. 1012.) The court in *Jones* explained that this meant that the firearm use "may be deemed to occur 'in the commission of' the offense if it occurred *before, during, or after* the technical completion of the felonious sex act. *The operative question is whether the sex offense posed a greater threat of harm—i.e., was more culpable—because the defendant used a deadly weapon to threaten or maintain control over his victim*." (*Jones*, *supra*, 25 Cal.4th at pp. 109–110, italics added.)

We interpret the phrase "in the commission of" for purposes of section 667.61, subdivision (d)(5) in the same way. (See *Fausto*, *supra*, 180 Cal.App.4th at p. 899 ["as a matter of statutory interpretation, identical terms in analogous statutes are to be construed

in like manner"].) That is, the operative question is whether the rape in concert "posed a greater threat of harm" because M.B. had been kidnapped. (See *Jones, supra,* 25 Cal.4th at p. 110.) And the jury was instructed that in order to find the kidnapping circumstance true, it had to find "the movement of [M.B.] *substantially increased the risk of harm to her* beyond that necessarily present in the rape in concert." (Italics added.) This instruction adequately informed the jury of the necessary connection between the kidnapping and the rape.

We therefore reject defendant's contention that the jury was not properly instructed on the "in the commission of" element of the kidnapping allegation. While the instruction did not include that statutory language, it was consistent with our high court's explanation of the meaning of that language. Defendant suggests the instruction should have explained more clearly the required temporal relationship between the kidnapping and the rape. But under *Masbruch* and *Jones*, a kidnapping may take place "before, during, or after" the rape and be treated as occurring "in the commission of" the rape. (*Jones, supra,* 25 Cal.4th at pp. 109–110, italics omitted.) Defendant also suggests the trial court should have instructed the jury that the kidnapping took place in the commission of the rape if it was part of "one continuous transaction." But we have already concluded the instruction was adequate; defendant did not request further clarification of the instruction on the kidnapping allegation, and he may not now complain that it was incomplete. (*Mayfield*, *supra*, 14 Cal.4th at p. 778–779.)

To the extent defendant also challenges the sufficiency of the evidence to support a finding that the kidnapping increased the risk of harm above that inherent in the rape in concert, we are unpersuaded. The jury could reasonably conclude M.B. was subject to an increased risk of harm when she was taken from a public street to a private home, where three men were able spend hours committing crimes against her without interruption or fear of detection. (See *People v. Martinez* (1999) 20 Cal.4th 225, 233 [substantial increase in harm above that inherent in underlying crime may arise from decreased likelihood of detection or the attacker's enhanced opportunity to commit additional crimes].)

III. DISPOSITION

The judgment is conditionally reversed. The cause is remanded to the juvenile court with directions to conduct a transfer hearing if the prosecution moves for such a hearing. If, at the transfer hearing, the juvenile court determines that it would have transferred defendant to a court of criminal jurisdiction under current law, the conviction and kidnapping finding shall be reinstated.

If no motion for a transfer hearing is filed, or if a hearing is held and the juvenile court determines it would not transfer defendant to a court of criminal jurisdiction, then defendant's criminal conviction and kidnapping finding will be deemed to be a juvenile adjudication. The court is then to conduct a dispositional hearing and impose an appropriate disposition.

_____
Tucher, J.

We concur:

_____
Streeter, Acting P.J.

_____
Lee, J.*

* Judge of the Superior Court of California, City and County of San Mateo, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.